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In the Supreme Court of the United States

OCTOBER TERM, 1975

ALFRED DUNHILL OF LONDON, INC., PETITIONER

v.

REPUBLIC OF CUBA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the question whether a foreign state's repudiation of a commercial obligation precludes entry of judgment in favor of the private claimant.

INTEREST OF THE UNITED STATES

This case requires consideration of the interrelationship of the doctrine of foreign sovereign immunity and the act of state doctrine as they apply to commercial litigation to which a foreign state is a party. In the conduct of its foreign relations, the

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United States has adopted the restrictive theory of foreign sovereign immunity. Under this principle of international law, foreign states are not immune from suits brought against them in their commercial capacities; implicit in this principle is the belief that foreign states are not entitled to avoid adjudication of their commercial liabilities by the mere assertion of sovereignty. At the same time, the United States has supported the judicial application of the act of state doctrine. A principal concern underlying that doctrine is that judicial review of a foreign state's public acts might interfere with or embarrass the conduct of foreign relations by the Executive. Both the doctrine of foreign sovereign immunity and the act of state doctrine implicate important foreign policy interests of the United States. This brief is filed in order to set forth the views of the United States as to the proper accommodation between those two doctrines in the circumstances of this and similar cases.

STATEMENT

On September 15, 1960, respondent Republic of Cuba nationalized, or "intervened,"[1] five private

[1] Although there are technical differences between nationalization and intervention, their practical consequences appear to be indistinguishable:

> Under "intervention" procedure the interventor is vested with complete possession and control of a business enterprise to the exclusion of the officers, directors, shareholders, partners or other persons who would otherwise manage and conduct it. Though intervention does not appear to effectuate a formal transfer of title from the former owners and managers to the governmental authorities, the end result is indistinguishable in practical effect from complete confiscation—for almost six years the former owners have been ousted without their consent from all the properties and excluded from any participation in the businesses. Their rights to any receipts and profits have been eliminated. No compensation has been provided. [*Palicio* v. *Brush*, 256 F. Supp. 481, 484 (S.D. N.Y.), affirmed without opinion, 375 F. 2d 1011 (C.A. 2), certiorari denied *sub nom. Brush* v. *Republic of Cuba*, 389 U.S. 830.]

Cuban cigar manufacturing companies[2] that had been engaged in the business of exporting tobacco products to the United States; their customers included several American importers, including petitioner, Alfred Dunhill of London, Inc.[3] Designees of the Cuban government (the "interventors") assumed possession and control of the businesses and assets of the intervened tobacco companies.

The tobacco companies' business operations were not immediately disturbed by the intervention. Petitioner and other importers continued their purchases of tobacco products after the companies came under the interventors' control, and "[s]hipments from Cuba to the importers continued until February, 1961, when relations between the importers and interventors deteriorated for various reasons" (J.A. 4a; 485 F. 2d at 1360–1361).[3a] During the time that normal business relations continued, the importers made payment to the

[2] Some of the tobacco companies had been organized as corporations, others as partnerships, but all or substantially all of the beneficial ownership interests in each had been held by Cuban nationals (the "prior owners"). (Except where otherwise noted, the facts set forth in this statement are taken from the opinions below.)

[3] Petitioner is a corporation organized under the laws of the State of Delaware (A. 8).

[3a] "J.A." refers to a joint appendix containing the opinions of the courts below; it was filed in connection with the petition for a writ of certiorari in No. 73–1287.

interventors on account of their liabilities for pre-intervention, and apparently also for some post-intervention, shipments of tobacco products. When importation ceased, the importers owed substantial amounts for post-intervention shipments, and these debts were left unpaid.

This case arose as one of several actions brought in the United States District Court for the Southern District of New York by the prior owners of the intervened companies (see note 2, *supra*) against petitioner and other importers for amounts allegedly due to them individually for post-intervention shipments of tobacco products. The intervened tobacco companies brought a separate action in the same district court, challenging the right of the prior owners to maintain their actions against petitioner and the other importers. In the course of that litigation, the interventors stipulated that the prior owners were entitled to payment for pre-intervention shipments.

The district court sustained the interventors' contentions with regard to the post-intervention shipments of tobacco products; the court determined that judicial inquiry into the validity of the intervention, at least insofar as the intervention affected rights of Cuban nationals in tangible property that had been held by the tobacco companies in Cuba, was precluded by the "act of state" doctrine and therefore that "the debts due for the price of cigars shipped after the interventions are owing to the interventors and not to the former owners * * *." *Palicio* v.

Brush, 256 F. Supp. 481, 489 (S.D. N.Y.).[4] The court of appeals affirmed, 375 F. 2d 1011 (C.A. 2), and this Court denied certiorari, 389 U.S. 830.

Following the conclusion of that litigation, respondents[5] intervened as plaintiffs in this and the other actions that had been brought against petitioner and the other importers by the prior owners; the prior owners apparently amended their complaint to seek recovery for the tobacco companies' pre-intervention shipments of tobacco products. The actions were consolidated for trial and tried without a jury. At trial, it developed that, pursuant to the interventors' previous stipulation, substantial amounts were owed the prior owners by the importers for pre-intervention shipments. Respondents thereupon disavowed the interventors' previous stipulation and asserted that they were entitled to recover or retain payments for pre-intervention as well as post-intervention shipments. They contended that the intervention had reached all property interests held by the tobacco companies on September 15, 1960, including intangible property

[4] The district court rejected the prior owners' contention that the so-called Hickenlooper Amendment to the Foreign Assistance Act of 1964, 78 Stat. 1013, 22 U.S.C. 2370(e)(2), barred application of the act of state doctrine. The court noted that the amendment applies only to acts by foreign sovereigns "in violation of the principles of international law," whereas the uncompensated nationalization of companies owned by Cuban nationals did not violate international law. 256 F. Supp. at 487.

[5] The respondents here are the Republic of Cuba and one of the interventors, Daniel Solano Pinera, who apparently now has been designated the single "interventor" for the five tobacco companies (No. 73–1287, Pet. 1–2).

such as the outstanding accounts receivable for prior shipments, and that, as in the earlier litigation between the interventors and the prior owners, judicial inquiry into the validity of the intervention was precluded by the act of state doctrine.

The district court determined initially that the importers were liable to respondents for the amounts owing on account of post-intervention shipments (J.A. 44a; 345 F. Supp. at 534). As to the pre-intervention shipments, the district court found that respondents in fact had already received payment from the importers (J.A. 46a; 345 F. Supp. at 536). But the court further held that, as against the prior owners, respondents had no legal entitlement to those payments (J.A. 46a–50a; 345 F. Supp. at 536–540), and that the importers had not discharged their liabilities to the prior owners by making payment to respondents (J.A. 50a–52a; 345 F. Supp. at 540–542). Accordingly, the district court determined that the importers were liable to the prior owners for the pre-intervention shipments (*ibid.*), but that the importers were entitled to restitution of the amounts received by respondents on account of those shipments (J.A. 53a–54a; 345 F. Supp. at 543–544). At trial, respondents' counsel represented that their clients would refuse to honor any obligation to make restitution; they argued that such a repudiation constituted an act of state that precluded entry of judgment against respondents (J.A. 54a; 345 F. Supp. at 544). The district court refused to give that effect to the repudiation (J.A. 55a–56a; 345 F. Supp. at 545–546), and entered judgment against respondents, in favor

of the importers, for a return of the money. Each of the importers, except petitioner, was able to use its recovery for restitution as an offset against its liability to respondents for post-intervention shipments. Petitioner's claim against respondents, however, exceeded respondents' claim against petitioner by some $55,000, and petitioner was therefore awarded an affirmative judgment against respondents in the amount of that excess (J.A. 74a; 345 F. Supp. at 564).

All parties appealed, and the court of appeals affirmed the district court in all respects but one. The court first analyzed the respective rights of respondents and the prior owners. The court determined, relying upon *Republic of Iraq* v. *First National City Bank,* 353 F. 2d 47 (C.A. 2), certiorari denied, 382 U.S. 1027, and *Tabacalera Severiano Jorge, S.A.* v. *Standard Cigar Co.,* 392 F. 2d 706 (C.A. 5), certiorari denied, 393 U.S. 924, that pre-existing rights and duties between American debtors and foreign creditors are not affected by a foreign sovereign's seizure of the creditors' assets if that seizure is inconsistent with American laws and policies; that the Cuban intervention was inconsistent with our laws and policies; and, implicitly, that the pre-existing debts owed by the importers had run to the individual beneficial owners of the intervened tobacco companies and not to the companies themselves as separate legal entities (J.A. 11a–13a; 485 F. 2d at 1364–1365).[6] Thus

[6] Although its opinion is somewhat ambiguous, the court apparently determined not to give *res judicata* effect to the interventors' stipulation, in the earlier litigation, concerning the prior owners' entitlement to pre-intervention shipments (J.A. 10a–11a; 485 F. 2d at 1363–1364).

the court concluded that the prior owners, rather than respondents, were entitled to payment for the pre-intervention shipments of tobacco products to the importers.

The court of appeals then considered the prior owners' specific claims against the importers. The court rejected the importers' contention that they had discharged their debts to the prior owners for pre-intervention shipments by making payment to respondents in the ordinary course of business; the importers apparently did not deny that they had been aware that under domestic commercial law their debts were owing to the prior owners and not to respondents, and the court determined that the importers' payments to respondents had not been authorized or ratified by the prior owners (J.A. 18a–20a; 485 F. 2d at 1367–1368). The court therefore affirmed the judgments against the importers for the amount of their indebtedness to the prior owners as of the date of intervention.

Finally, the court turned to respondents' and the importers' claims against one another. The importers conceded their liability to respondents for the post-intervention shipments. Counsel for respondents, however, represented that their clients would not honor the obligation to return to the importers the payments made by the latter on account of the pre-intervention shipments. As they had done in the district court, counsel for respondents contended that even though respondents may have had no legal entitlement to those payments under applicable com-

mercial law, their refusal to honor any consequent obligation to return the moneys was itself an act of state that precluded judicial enforcement of the importers' right to restitution. The court determined that respondents' refusal to satisfy their quasi-contractual obligation to return the payment "was an act of state even though not embodied in a formal decree" (J.A. 26a; 485 F. 2d at 1371). However, relying upon *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, the court held that the act of state doctrine did not bar enforcement of "the importers' counterclaims * * * up to the limits of the respective claims asserted against them by [respondents]" (J.A. 30a; 485 F. 2d at 1373). The court therefore concluded (J.A. 31a; 485 F. 2d at 1374):

> [E]ach of the importers' counterclaims is allowed up to the limit of [respondents'] claims against it. However, the district court's decision, to the extent that it awards an affirmative judgment [of approximately $55,000] in favor of [petitioner] in excess of the claims against it, is reversed.[7]

Petitioner then petitioned this Court for review of the denial of an affirmative judgment against respondents (No. 73–1288). Respondents sought review of the determination that the prior owners, and not respondents, were entitled to payment on account of

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[7] The court determined that the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2), was inapplicable because petitioner's counterclaim for restitution was not a "claim of title or other right to property" within the meaning of that Amendment (J.A. 26a–27a; 485 F. 2d at 1371–1372).

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the pre-intervention shipments of tobacco products (No. 73–1287). The importers, including petitioner, filed a cross-petition, claiming that if respondents' contention in No. 73–1287 were sustained, the importers should be relieved of their liabilities to the prior owners (No. 73–1289). This Court granted only petitioner's separate petition in No. 73–1288. 416 U.S. 981.

INTRODUCTION AND SUMMARY OF ARGUMENT

In granting review of this case, and in restoring the case to the calendar last Term, this Court requested that the parties brief and argue three questions:

1. Can statements by counsel for the Republic of Cuba, that petitioner's unjust enrichment counterclaim would not be honored, constitute an "act of state"?

2. If so, is an exception to the act of state doctrine created, under *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, where petitioner's counterclaim does not exceed the net balance owed to Cuba on its claims by petitioner's co-defendants, and where all claims and counterclaims arise out of the subject matter in litigation in this case?

3. Whether this Court's holding in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, should be reconsidered.

In framing those questions, the Court manifested an intention of focusing upon the relationship of the act of state doctrine to the representation by counsel that respondents would refuse to honor any quasi-contractual obligation to make restitution to petitioner. Respondents now seek to avoid this inquiry by contesting the existence of any such obligation. They contend, contrary to the holdings of the courts below, that on the basis of the intervention they had a legal entitlement to receive and retain payment for the pre-intervention shipments, to the exclusion of any rights of the prior owners (Resp. Br. on Reargument, pp. 1–8). We take no position on the merits of this contention. We make two observations concerning it, however. First, since the logic of respondents' contention would require dismissal of petitioner's, and the other importers', counterclaims in their entirety, that contention does not support the judgment below and therefore need not be considered by the Court, if indeed the Court has jurisdiction at all to consider such a contention by a respondent. See *United States* v. *ITT Continental Baking Co.,* 420 U.S. 223, 226–227, n. 2. See generally Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?,* 87 Harv. L. Rev. 763 (1974).[8] Moreover, consideration of that contention would appear to require consideration as well of the possible *res judicata* effect of the interventors' earlier stipulation that the prior owners were entitled to payment for the pre-intervention shipments (see J.A. 10a–11a; 485 F. 2d at 1363–1364).

Second, respondents' contention that they were legally entitled under the intervention to retain peti-

[8] The substance of respondents' contention appears to be subsumed under the third question presented in their separate petition for a writ of certiorari in this case (No. 73–1287). Neither that petition nor the importers' cross-petition (No. 73–1289) has been acted upon by the Court.

tioner's payments leads them to assert that "it is the intervention which is the act of state, not the repudiation of a commercial debt" (Resp. Br. on Reargument, p. 8); but this characterization of the pertinent act of state represents an abandonment of the litigating position upon which the court of appeals rested its decision to deny an affirmative judgment to petitioner. Respondents' act of state defense in the court of appeals was "grounded on the fact that when the importers demanded return of the payments[, respondents] ignored the demands" (J.A. 22a; 485 F. 2d at 1369), and in this Court, until briefing on reargument, respondents consistently maintained that the act of state in question was "the repudiation of a commercial debt" (No. 73-1287, Pet. 7; see also Br. in Op. 3 and Resp. Br. 17-18). Respondents now appear to suggest that their refusal to make restitution to the importers, far from being a repudiation of a commercial debt, was merely the assertion of a claim of right, based upon the intervention, to retain the moneys pending final adjudication and was not intended to preclude entry of an adverse judgment. If so, the court of appeals plainly erred in relying upon that refusal as a basis for applying the act of state doctrine to deny affirmative judgment to petitioner.

For purposes of analysis here, however, we assume that respondents in fact have repudiated an obligation to make restitution to the importers.[9] As *amicus*

[9] For the reasons set forth below (pp. 27-35, *infra*), the repudiation of a commercial obligation, whether announced by formal decree or merely by counsel in the course of litigation, is not a public act of state. But if this Court concludes to the contrary that such a repudiation can be a public act of state, in determining whether the repudiation here was such an act the Court would have to consider whether respondent Republic of Cuba actually authorized counsel to represent the fact of repudiation. If that representation was unauthorized, then of course there has been no repudiation and *a fortiori* no act of state. The question of authority is a factual one that, if necessary, presumably should be tried in the first instance by the district court. But for purposes of analysis, we assume that counsel's representation was authorized. See Resp. Br. 12.

curiae, the United States takes as fixed the legal rights and duties of the respective parties determined by the court of appeals, including respondents' quasi-contractual obligation to make restitution to the importers, except insofar as those rights and duties may be affected by respondents' repudiation. In this brief, we discuss only the legal effect that must be given to such a repudiation by a state or federal court.

We believe that the proper accommodation between the doctrine of sovereign immunity and the act of state doctrine requires that no legal effect be given to such a repudiation in the circumstances of this and similar cases.

Under the modern restrictive theory of foreign sovereign immunity, adhered to by the United States and most foreign industrial states in the conduct of foreign relations, immunity is claimed or granted only with respect to causes of action arising out of a state's governmental acts and not with respect to those arising out of its commercial or private acts. The practical foundation of this theory, which has been adopted and applied by the lower federal and state courts, is the consideration that "the widespread

and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." 26 Dept. State Bull. 984, 985 (1952).

Respondents in this case would not have been entitled to sovereign immunity even had they claimed it. Petitioner's cause of action for restitution is based upon acts committed by respondents in their commercial capacities as tobacco merchants, and under the restrictive theory of sovereign immunity respondents were not immune from suit on that cause of action.

Respondents' contention here—that their naked repudiation of any obligation to make restitution to petitioner is an "act of state" that bars entry of judgment in favor of petitioner—is nothing more than a bald claim that a foreign state may bar judicial enforcement of its commercial liabilities by mere assertion of its sovereignty in the form of a repudiation of those liabilities. It is nothing more, in other words, than a claim of sovereign immunity in disguise. This effort to resurrect the doctrine of absolute foreign sovereign immunity under cover of the act of state doctrine should be rejected.

Moreover, respondents' repudiation is not the kind of state act that traditionally has been accorded protection under the act of state doctrine. First, that repudiation was not a "public act," *i.e.,* it was not a "governmental act in which the sovereign's interest qua sovereign is involved." *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 445, n. 3 (dissenting opinion

of Mr. Justice White). To the contrary, the repudiation was a private act arising out of purely commercial dealings and as such was not entitled to the judicial deference accorded public acts. See *Victory Transport, Inc.* v. *Comisaria General,* 336 F. 2d 354 (C.A. 2), certiorari denied, 381 U.S. 934. Second, respondents' repudiation did not satisfy the territorial prerequisite to application of the act of state doctrine. That doctrine applies only where the predominant jurisdictional contacts of the foreign state's act are outside the United States. In this case, the predominant jurisdictional contacts are with the United States.

For these reasons, we believe that it is not necessary for this Court to reach the second and third questions it has framed in this case: the Court need not consider whether this case falls within an exception to the act of state doctrine created under *First National City Bank* v. *Banco Nacional de Cuba, supra,* or whether the act of state doctrine as formulated and applied in *Banco Nacional de Cuba* v. *Sabbatino, supra,* should be reconsidered, for the reason that the act of state doctrine does not apply here at all. But if it is determined, to the contrary, that the act of state doctrine in its traditional formulation would require judicial deference to respondents' repudiation of their commercial obligation, we believe that that doctrine should be reconsidered and narrowed in light of modern restrictive notions of foreign sovereign immunity.

The judicial concerns that have given rise to the act of state doctrine would not be implicated by a refusal to give legal effect to respondents' repudiation of their

commercial obligation in this case. First, it is clear that manageable legal standards exist for the adjudication of the obligations arising from a foreign state's commercial acts; the difficulty of selecting manageable legal standards against which to measure a repudiation of such obligations therefore does not arise, for such standards inhere in the law governing the underlying commercial transaction. Second, a court's entry of judgment against a foreign state on the basis of a commercial obligation would not embarrass the United States in the conduct of its foreign relations, even if the foreign state has repudiated that obligation. Such a judgment would rest, at bottom, upon a determination that the commercial activities of a foreign state are subject to the same law that applies to commercial acts of private parties: the adjudication of liability would be based upon the law applicable to commercial transactions, and the judicial refusal to give effect to a foreign state's repudiation of that liability would be based upon the principle that a foreign state's commercial activities are governed by that law. That is precisely the principle to which the United States has adhered in the conduct of its foreign relations by subscribing to the restrictive theory of sovereign immunity.

Finally, there are strong affirmative reasons for refusing to afford the protection of the act of state doctrine to a foreign state's mere repudiation of its commercial obligations. With the growing participation of foreign governments and their instrumentalities in international trade, there has been a significant

increase in the commercial interaction between American businesses and state-owned foreign enterprises. It is in the interest of the United States that such commercial interaction be subject to the rule of law. The United States also has a more specific interest in being able to enforce its own laws against foreign-state enterprises engaged in commercial activities having substantial contacts with this country. These interests can be safeguarded only by judicial refusal to apply the act of state doctrine either to the purely commercial, nongovernmental acts of a foreign state or to a foreign state's repudiation of obligations arising from such acts.

ARGUMENT

A FOREIGN STATE'S REPUDIATION OF A COMMERCIAL OBLIGATION DOES NOT PRECLUDE ENTRY OF JUDGMENT IN FAVOR OF THE PRIVATE CLAIMANT

In our view, this case is governed by the following argument—

> Under modern precepts of sovereign immunity, a foreign state may not assert mere sovereignty as a preclusive defense against a claim or counterclaim relating to a commercial obligation.
>
> But to defer to a foreign state's sovereignty by refusing to enter judgment against it in an action on a commercial obligation merely because of that state's repudiation of the obligation would be to permit the state to assert mere sovereignty as a preclusive defense.
>
> Therefore, a foreign state's repudiation of a commercial obligation does not preclude entry of judgment in favor of the private claimant.

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In part A, *infra*, we elaborate upon this argument. In part B, *infra*, we discuss the relationship that that argument bears to the act of state doctrine in this case.

A. SINCE A FOREIGN STATE MAY NOT ASSERT SOVEREIGN IMMUNITY AS A DEFENSE TO A CLAIM RELATING TO A COMMERCIAL OBLIGATION, A STATE MAY NOT PRECLUDE ADJUDICATION OF SUCH A CLAIM ON ITS MERITS MERELY BY REPUDIATING ITS OBLIGATION

1. This Court has long recognized that a commercial enterprise owned or controlled by a sovereign is not immune from suit on a cause of action arising out of its business dealings. As Mr. Chief Justice Marshall noted in his opinion for the Court in *Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat. 904, 907:

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

Thus in *Sloan Shipyards* v. *U.S. Fleet Corp.*, 258 U.S. 549, the Court held that a corporation all of whose stock was owned by the United States, and which operated as a federal agency, could be sued upon its contracts and for its torts. This rule also has long been applied to the separate commercial enterprises owned or controlled by foreign states. See, *e.g.*, *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F. 2d 199 (S.D. N.Y.); *The Ural*, 40 F. Supp. 258 (D. Mass.); *The Beaton Park*, 65 F. Supp. 211 (W.D. Wash.); *Plesch* v. *Banque Nationale de la Republique D'Haiti*, 273 App. Div. 224, 77 N.Y.S. 2d 43.

Prior to 1952, a contrary rule applied in the United States with respect to the commercial activities conducted directly by foreign states themselves, rather than by their wholly owned commercial enterprises. This Court had accorded foreign states in their commercial capacities the same absolute immunity from suit that they enjoyed in their governmental capacities. See *Guaranty Trust Co.* v. *United States*, 304 U.S. 126; *Berizzi Bros. Co.* v. *Steamship Pesaro*, 271 U.S. 562. But in 1952, the Department of State, following the lead of most civil law countries, adopted the international legal principle that foreign states are not entitled to immunity from suits brought against them in their commercial capacities. See 26 Dept. State Bull. 984 (1952) (the so-called Tate Letter).[10] The Department of State determined that in

[10] For recent foreign decisions applying that principle, see, *e.g.*:

Austria: *Holoubek* v. *United States*, 40 Int'l L. Rep. 73 (Sup. Ct., 1961).

Belgium: *Socobel* v. *Greek State*, 18 Int'l L. Rep. 3 (Trib. Civ. Brussels 1951).

Canada: *Penthouse Studios, Inc.* v. *Republic of Venezuela*, 8 D.L.R. 3d 686 (Ct. App. Quebec, 1969).

England: *Thai-Europe Tapioca Services, Ltd.* v. *The Government of Pakistan* (court of Appeal) (see *The Times* (London), July 16, 1975). *The Phillippine Admiral* (Privy Council, November 6, 1975) (see *The Times* (London), November 11, 1975, p. 14).

Egypt: *Federated People's Republic of Yougoslavia* v. *Kafr*

acting upon requests by foreign states for sovereign immunity, and in determining whether to request the Department of Justice to suggest that defense in United States courts, it would adhere to the "restrictive theory" of foreign sovereign immunity, under which immunity is granted only with respect to causes of action arising out of a foreign state's governmental acts (*jure imperii*) and not with respect to those arising out of its commercial or proprietary acts (*jure gestionis* (*id.* at 984–985):

> The Department of State has for some time had under consideration the question whether the practice of the Government in granting im-

El-Zayat Cotton Co., Ltd., 18 Int'l L. Rep. 225 (Civ. Trib. Alexandria 1951).

France: *Administration des Chemins de Fer Iraniens* v. *Societe Levant Express Transport*, 73 Rev. Gen. Dr. Int'l Pub. 883 (Sup. Ct. 1969).

Germany: *Claim Against The Empire of Iran Case*, 45 Int'l L. Rep. 57 (Fed. Const. Ct. 1963).

Greece: *Papaevangelou* v. *United States Government*, (Athens Ct. First Inst., April 23, 1960).

Hong Kong: *Midland Investment Co., Ltd.* v. *The Bank of Communications*, 40 H.K.L. Rep. 42, 23 Int'l L. Rep. 234 (S. Ct. 1956).

Italy: *United States* v. *I.R.S.A. Co., Ltd.*, 86 Il Foro Ital. 1405 (Sup. Ct., *en banc*, March 13, 1963).

Jordan: *Nashashibi* v. *The Consul-General of France*, 26 Int'l L. Rep. 190 (Sup. Ct. 1958).

Pakistan: *Gammon-Layton Co., Ltd.* v. *United States of America*, (High Court of West Pakistan, Karachi Bench, January 2, 1965).

Philippines: *Carried Lumber Co.* v. *The United States of America* (Ct. App. Manila, Sept. 24, 1974).

Yugoslavia: *Zarko* v. *Office of International Trade Fairs, U.S. Department of Commerce* (Dist. Ct. Zagreb, June 10, 1966).

munity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. * * *

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.

* * * * *

[W]ith the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading

countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

This Court has not had occasion to consider the distinction articulated in the Tate Letter. But *cf. Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35. The lower federal courts and the state courts, however, now generally apply the restrictive theory in adjudicating foreign states' claims to sovereign immunity. See, *e.g.*, *Victory Transport, Inc.* v. *Comisaria General*, 336 F. 2d 354 (C.A. 2), certiorari denied, 381 U.S. 934; *Petrol Shipping Corp.* v. *Kingdom of Greece*, 360 F. 2d 103 (C.A. 2), certiorari denied, 385 U.S. 931; *Premier Steamship Co.* v. *Embassy of Algeria*, 336 F. Supp. 507 (S.D. N.Y.) *Ocean Transport Co.* v. *Government of Republic of Ivory Coast*, 269 F. Supp. 703 (E.D. La.); *ADM Milling Co.* v. *Republic of Bolivia*, Civil Action No. 75–946, decided August 8, 1975 (D.D.C.); *Et Ve Balik Kurumu* v. *B.N.S. International Sales Corp.*, 25 Misc. 2d 299, 204 N.Y.S. 2d 971; *Harris & Co. Advertising, Inc.* v. *Republic of Cuba*, 127 So. 2d 687 (Fla. Ct. App.). That theory is now generally accepted as the settled law of foreign sovereign immunity in this nation. See ALI, *Restatement (Second), Foreign Relations Law of the United States* § 69 (1965).[11]

As the Tate Letter indicates, the restrictive theory rests, at bottom, upon the consideration "that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." That consideration is, if anything, considerably more forceful today than it was in 1952, for the intervening years have seen a sharp increase in the volume of trade conducted between American businesses and foreign states, or their instrumentalities, acting in a commercial capacity. Cf. *International Economic Report of the President* 56 (1975). That consideration, in our view, considerably outweighs the traditional rationale for absolute foreign

[11] The Executive Branch has submitted to the Congress proposed legislation that would codify this modern development of sovereign immunity practice as it applies to foreign governments involved in litigation in federal and state courts. 121 Cong. Rec. S19,119 (daily ed. November 4, 1975). See also S. 566, 93d Cong., 1st Sess. (1973); H.R. 3493, 93d Cong., 1st Sess. (1973).

sovereign immunity, *i.e.*, "the desirability of avoiding adjudication which might affront the sovereignty of a foreign nation and thus embarrass the executive branch in its conduct of foreign relations." Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607, 1607–1608 (1962).

This is so for two reasons. First, the adjudication of a commercial claim against a foreign state on the merits does not "affront the sovereignty of a foreign nation" because sovereignty as such is not implicated in such an adjudication; the foreign state makes its appearance in the marketplace as a merchant, not as a sovereign, and it is as a merchant that the foreign state is adjudged liable on its commercial obligations. Second, since the Department of State has officially adopted the restrictive theory of foreign sovereign immunity, and since that theory is widely followed in other nations (see note 10, *supra*), adjudications in conformity with that position would further, rather than hinder, the foreign policy objectives of the Executive. Accordingly, this Court should approve those lower court decisions that have adopted and correctly applied the restrictive theory of sovereign immunity. Parties with claims against foreign states arising out of commercial activities should not be denied their day in court by outmoded notions of absolute immunity which arose in the era of personal sovereigns.

2. Respondents have not asserted sovereign immunity as a defense to petitioner's claim for restitution, and it is clear that they would not have been

entitled to such a defense even had they asserted it. Petitioner's cause of action is based upon acts committed by respondents in their commercial capacities as sellers of tobacco products: petitioner had paid respondents, in their roles as tobacco merchants, amounts in excess of petitioner's actual indebtedness for tobacco purchases; petitioner's counterclaim simply seeks recovery of its excess payments.

Since petitioner's claim arises solely out of respondents' nongovernmental, commercial dealings, under the modern restrictive theory of foreign sovereign immunity even respondent Republic of Cuba would not have been immune from a suit brought by petitioner as a party plaintiff. See, *e.g.*, *Petrol Shipping Corp.* v. *Kingdom of Greece, supra. A fortiori,* respondent Republic of Cuba was not entitled to bar petitioner's counterclaim on grounds of sovereign immunity. *National Bank* v. *Republic of China,* 348 U.S. 356. This is true, moreover, even though the amount of petitioner's counterclaim exceeded the amount of respondents' claim against petitioner. See, *e.g.*, *Dexter & Carpenter* v. *Kunglig Jarnvagsstyrelsen,* 43 F. 2d 705 (C.A. 2); *Kingdom of Norway* v. *Federal Sugar Refining Co.,* 286 Fed. 188 (S.D. N.Y.); *Mexico* v. *Rask,* 118 Cal. App. 21, 4 P. 2d 981; *Et Ve Balik Kurumu* v. *B.N.S. International Sales Corp., supra.* Furthermore, even if the restrictive theory of sovereign immunity were for some reason held inapplicable here, respondent interventor, the party who actually received and retained petitioner's payments, would nevertheless be subject to suit by petitioner for

restitution, for as the mere representative of a separate commercial enterprise owned by a foreign state, the interventor would not in any event be clothed with whatever immunity the foreign state itself might retain. See, *e.g., Sloan Shipyards* v. *U.S. Fleet Corp., supra; United States* v. *Deutsches Kalisyndikat Gesellschaft, supra.* Thus, under any theory, respondents could not have avoided the obligation to make restitution merely by asserting sovereign immunity.

3. Respondents' contention here—that their naked repudiation of any obligation to make restitution to petitioner is an "act of state" that bars entry of judgment in favor of petitioner—is nothing more than a bald claim that a foreign state may bar judicial enforcement of its commercial liabilities by mere *ipse dixit, i.e.,* by mere assertion of its sovereignty in the form of a repudiation of those liabilities. It is nothing more, in other words, than a claim of sovereign immunity in disguise. This effort to resurrect the doctrine of absolute foreign sovereign immunity under cover of the act of state doctrine [12] will not do.

The purpose of the modern restrictive theory of sovereign immunity is to subject foreign states, just like private litigants, to adjudications of the liabilities they incur in the course of their commercial dealings, when they otherwise have come within the jurisdiction of the adjudicating tribunal. That purpose would be

[12] Indeed, on behalf of the respondent interventor it is an effort to extend sovereign immunity beyond its furthest historic reach. See *Sloan Shipyards* v. *U.S. Fleet Corp., supra; United States* v. *Deutsches Kalisyndikat Gesellschaft, supra.*

completely frustrated by permitting a foreign state to preclude judgment in favor of a commercial creditor by the simple, if unorthodox, expedient of announcing its determination to refuse payment. If the restrictive theory of sovereign immunity is to have any meaning and force, as we believe it must, respondents' contention here must be rejected.

Moreover, this conclusion holds, as we now show, without regard to whether respondents' repudiation of their debt to petitioner is or is not properly characterized as an "act of state."

B. TO THE EXTENT THAT THE ACT OF STATE DOCTRINE REQUIRES JUDICIAL DEFERENCE TO A FOREIGN STATE'S REPUDIATION OF A COMMERCIAL OBLIGATION, IT SHOULD BE RECONSIDERED IN LIGHT OF THE RESTRICTED SCOPE OF THE MODERN DOCTRINE OF FOREIGN SOVEREIGN IMMUNITY

1. The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 401. The doctrine applies to "acts done within their own States, in the exercise of governmental authority * * *." *Underhill* v. *Hernandez,* 168 U.S. 250, 252. Thus in its traditional formulation, the act of state doctrine may be invoked only if two necessary conditions are met: the alleged act of state must be a "governmental act in which the sovereign's interest qua sovereign is involved" (*Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at 445, n. 3 (dissenting opinion of Mr. Justice White)), and it must satisfy a requirement relating to territoriality.

In our view, the alleged act of state here—respondents' repudiation of a commercial obligation to a person beyond Cuba's territorial ~~sovereignty~~ sovereignty—meets neither of those two conditions.

a. In repudiating a quasi-contractual obligation arising out of their purely commercial dealings, respondents do not appear to have been performing a "public act," *i.e.*, a "governmental act in which the sovereign's interest qua sovereign is involved." To the contrary, respondents' repudiation is akin to, if not in fact analytically indistinguishable from, the repudiation of a contractual obligation. But the act of state doctrine does not immunize from judicial scrutiny a foreign state's failure or refusal to discharge its commercial obligations; the doctrine does not protect a foreign state's mere commercial or private acts.

This explicitly is the rule in England, where the courts, in formulating the act of state doctrine, have expressly distinguished between a foreign state's governmental acts and its private or commercial transactions. For example, in the landmark case of *Duke of Brunswick* v. *King of Hanover,* [1848–50] 2 H.L.C. 1, the House of Lords limited the scope of the act of state doctrine to acts constituting an "exercise of public authority" (*id.* at 17), in contrast to acts in the nature of "a private transaction"(*id.* at 21).

This Court has not heretofore had occasion to consider this distinction between public and commercial acts. The act of state cases this Court has decided all appear to have involved takings or other acts that were found to represent the exercise of sovereign

authority. See, *e.g., Shapleigh* v. *Mier,* 299 U.S. 468; *Ricaud* v. *American Metal Co.,* 246 U.S. 304; *Oetjen* v. *Central Leather Co.,* 246 U.S. 297. But the Second Circuit did apply that distinction in *Victory Transport, Inc.* v. *Comisaria General, supra.* In that case, an instrumentality of the Spanish government was sued by the owner of a ship to compel arbitration of a claim for damages to the ship's hull sustained in Spanish ports. The Spanish government had voyage-chartered the ship to carry a cargo of wheat from the United States to "safe" ports in Spain. The damages were sustained, according to the shipowner, because the ports were not safe. The Spanish government, claiming that it had designated the port as "safe," resisted the shipowner's petition on the ground that the act of state doctrine prohibited inquiry into the correctness of that designation. The court of appeals rejected that defense, stating (336 F. 2d at 363):

> [T]he act of state doctrine applies only to the "public acts" of a foreign sovereign, Restatement Foreign Relations Law of U.S. § 41c (Proposed Official Draft 1962), and we cannot see that designating ports as safe for the S.S. Hudson was a public act of the Spanish Government. The designation of safe ports for the discharge of cargo is an act frequently performed by merchants voyage-chartering a cargo ship. * * * It can hardly be termed an act of state simply because a state instrumentality happened to be the voyage-charterer.

The decision in *Victory Transport* was correct. The designation of safe ports as a part of a chartering

agreement, entered into for the purpose of transporting wheat, was a purely commercial act. The foreign state's claim—that the act of state doctrine precluded inquiry into the propriety of its designation—was simply an effort "to enter the sanctuary of sovereign immunity through the side door * * *" (336 F. 2d at 362). In rejecting that claim, the Second Circuit correctly determined that a voyage-charterer's designation of a safe port is essentially commercial rather than governmental.

The same analysis is appropriate here. Respondents' refusal to repay moneys mistakenly paid to them by petitioner, in the course of their tobacco transactions, constituted the breach of a quasi-contractual obligation to make restitution. Respondents' claim—that their repudiation of any obligation is an act of state that bars judicial inquiry into the existence of an obligation—is simply an effort to assert sovereignty as a bar to judgment. But a tobacco merchant's repudiation of an obligation to make restitution, like a voyage-charterer's designation of a safe port, is not an act that is sovereign in nature.[13] Accordingly, since the

[13] "In considering what is commercial activity, the standard to be applied is that of the state exercising jurisdiction." ALI, *Restatement (Second), Foreign Relations Law of the United States, supra*, § 69 at 209. Thus a naked claim by respondents that their repudiation is noncommercial is insufficient to establish that proposition. Moreover, at least for purposes of the doctrine of foreign sovereign immunity, the determination of whether an act is public or commercial depends on the nature of the act, not its purpose. For example, a contract by a foreign state to purchase clothing is a commercial act, even though the foreign state's purpose may be to clothe its army. See *Et Ve Balik Kurumu* v. *B.N.S. International Sales Corp., supra.*

alleged act of state involved here, the repudiation, is a private act, arising out of commercial dealings, and not a "governmental act in which the sovereign's interest qua sovereign is involved," the act of state doctrine by its own terms does not apply.

b. Nor does respondents' repudiation of their obligation to make restitution to petitioner satisfy the territorial prerequisite to application of the act of state doctrine. That requirement has frequently been alluded to in the decisions of this Court, but it has rarely been closely defined. The act of state doctrine is generally described as applying to acts committed by a foreign state within its own territory. See, *e.g.*, *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at 401; *Underhill* v. *Hernandez, supra,* 168 U.S. at 252. A close examination of the cases and of the purpose and operation of that doctrine, however, reveals that it is not the locus of the state act but rather the predominant jurisdictional contacts of the act, or of the transactions to which it relates, that determine the availability of an act of state defense.

The courts of this country apply the act of state doctrine only where the predominant jurisdictional contacts are outside the United States, *i.e.*, where under commonly accepted conflict principles, the substantive law of the foreign state controls the adjudication of the merits of the dispute. See ALI, *Restatement (Second), Foreign Relations Law of the United States, supra,* § 41 at 131, comment j; see also *id.*, §§ 18, 19, 43. That is the central territorial limitation on the applicability of the act of state doctrine.

That limitation serves to restrict the applicability of the act of state doctrine to cases where that doctrine serves its principal purpose of preventing American courts from examining "the acts of a foreign sovereign * * * in order to determine whether or not those acts were legal under the municipal law of the foreign state." *Banco de España* v. *Federal Reserve Bank of New York*, 114 F. 2d 438, 443 (C.A. 2). See also *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246, 249 (C.A. 2) certiorari denied, 332 U.S. 772.

Where the predominant jurisdictional contacts of a transaction are with a foreign state, so that the law of the foreign state controls the rights and duties arising from the transaction (see, *e.g.*, *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917), the act of state doctrine obviates the embarrassment to foreign relations that might result from a judicial determination that a foreign state's public acts are inconsistent with the foreign state's own laws. See *Blad* v. *Bamfield*, 36 Eng. Rep. 992; *Duke of Brunswick* v. *King of Hanover*, *supra*.

In practice, therefore, the act of state doctrine applies principally to two types of public acts that have their predominant jurisdictional contacts with the foreign state. First, the doctrine applies where the act in question is an implementation, solely within the foreign state. Cf. *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347. In such situations, the statute or decree itself ordinarily would provide the rule of

the foreign state's territory, of a statute or decree of,

law applicable to the case;[13a] the act of state doctrine "precludes a challenge to the validity of foreign law on the ordinary conflict of laws ground of repugnancy to the public policy of the forum." *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 446 (dissenting opinion of Mr. Justice White).

Second, the act of state doctrine has been applied to other public acts that may not be governed or explicitly authorized by statute or decree but that do have predominant jurisdictional contacts with the foreign state. For example, a claim that an American citizen was falsely imprisoned by a foreign state within its territory ordinarily would require adjudication of the lawfulness of the imprisonment under the foreign state's own law; that is a matter into which our courts do not inquire under the act of state doctrine. *Underhill* v. *Hernandez*, *supra*.

The concerns reflected by the application of the act of state doctrine in the two sets of circumstances just discussed are not implicated, however, where, because the predominant jurisdictional contacts of the transaction affected by the act of state are with the United States, American law controls the adjudication of the merits of the dispute. By definition, the rules of law of a foreign state are not applicable in the latter case.

[13a] Where the statute or decree effectuates a taking of property within the foreign state's territory, American courts may examine the validity of that taking under both "the principles of international law" (22 U.S.C. 2370(e)(2)) and any "treaty or other unambiguous agreement regarding controlling legal principles." *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 428.

Similarly, where American law controls there is no danger of adjudicating the foreign state's act invalid under its own laws.

In the instant case, the district court correctly determined that the predominant contacts of the transactions underlying petitioner's claim for restitution were with the United States rather than with Cuba and therefore that, under applicable conflict principles, that claim was controlled not by Cuban but by American law (J.A. 55a, 345 F. Supp. at 545):

> [Petitioner's] claims are obligations arising out of unjust enrichment and are imposed by law * * *.
>
> * * *
>
> That these obligations arose out of the mistaken payment of debts due and owing in the United States by importers located here has already been made clear. All payments by the importers were made by check drawn against their accounts in banks in the United States. Most of the payments were made to collecting banks in the United States acting on behalf of the interventors. The funds from such checks as were sent directly to Cuba, could only be realized upon when collected by from the drawee banks in the United States.

Similarly, the predominant jurisdictional contacts of respondents' repudiation of their obligation to make restitution are with the United States. Respondents' repudiation was intended to operate not within Cuba's territorial sovereignty but within the United States, by "confiscating" a United States national's cause of action that was subject to adjudication in American

courts under American law.[14] Respondents' act had the sole purpose of depriving American courts of jurisdiction over a lawsuit otherwise properly before them involving issues of American law. As such, that act exceeded the traditional territorial limitation circumscribing the act of state doctrine. Under commonly accepted conflict principles, this act—a repudiation of an obligation incurred under American law in a transaction having predominant contacts with the United States—is subject to adjudication under American, not Cuban law. Cf. *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (C.A. 2).[15] Foreign state acts are not immunized from judicial scrutiny in such cases. See *United States* v. *Sisal Sales Corp.,* 274 U.S. 268.

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[14] Moreover, even if respondents' repudiation were characterized as a confiscation of actual moneys in Cuba to which petitioner had a claim, as a confiscation of "property" it would appear to be outside the protection of the act of state doctrine by virtue of the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 78 Stat. 1013, 22 U.S.C. 2370(e)(2).

[15] Even if the Court should decide not to make a choice of law on the basis of predominant jurisdictional contacts, the same result would be reached under conflict of law decisions by this Court in other cases relating to intangible property. Thus, the Court has held that a court may apply the law of the forum "where [both] the debtor and creditor are within the [court's] jurisdiction." *Standard Oil Co.* v. *New Jersey,* 341 U.S. 428, 439–440. See also *Cities Service Co.* v. *McGrath,* 342 U.S. 330, 334; *Curry* v. *McCanless,* 307 U.S. 357, 365–366. Cf. *Texas* v. *New Jersey,* 379 U.S. 674. In the present case, petitioner is domiciled in the United States and respondents have brought themselves within the jurisdiction of this nation's courts. Since both parties to the obligation are within the jurisdiction of an American court in this case, American law can be applied to determine the rights and liabilities arising from obligations between these parties.

2. But to the extent that, contrary to the analysis set forth above, the act of state doctrine is construed as precluding inquiry into a foreign state's repudiation of a purely commercial debt in the circumstances of this case, that doctrine should be reconsidered and abrogated.

a. The act of state doctrine has arisen principally from two interrelated, and substantial, judicial concerns: the possible absence of any manageable legal standards by which the validity of a foreign state's act may be measured, and the possibility that review of the validity of a foreign state's acts might interfere with or embarrass the conduct of foreign relations by the political branches. See *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at 423; *First National City Bank* v. *Banco Nacional de Cuba, supra,* 406 U.S. at 765–768 (plurality opinion of Mr. Justice Rehnquist), 788 (dissenting opinion of Mr. Justice Brennan). Neither of these concerns would be implicated by a refusal to give legal effect to respondents' repudiation of their quasi-contractual obligation in this case.

i. Manageable legal standards exist for the adjudication of the liabilities arising from a foreign state's commercial acts. International commercial grievances between private parties have long been recognized as appropriate for judicial resolution, for there are developed systems of laws establishing identifiable norms against which commercial conduct can be measured. The rights and duties arising out of commercial relations are normally governed by a particular state's

law and, absent a specific choice of law provision in an agreement, commonly accepted conflict principles determine which state's law governs. See *Pritchard* v. *Norton,* 106 U.S. 124; ALI, *Restatement (Second), Conflict of Laws* § 188 (1971); Uniform Commercial Code § 1–105 (1965). See generally Ehrenzweig, *Contracts in the Conflict of Laws,* 59 Colum. L. Rev. 973, 1171 (1959). The applicability of these conflict principles, and of the domestic law of the state whose law governs under those principles, is not affected by the fact that one of the parties to the lawsuit is a foreign state. A foreign state's liabilities arising from its commercial acts may be adjudicated under the same manageable legal standards that apply to the commercial conduct of private persons. As the Permanent Court of International Justice observed in the case of *Serbian and Brazilian Loans,* P.C.I.J., Ser. A, No. 20/21, p. 41 (1929):

> Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the doctrine of conflict of laws.[16]

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[16] Although contracts between a state and an alien are usually based on the municipal law of some country, the breach of such contracts may also violate international law. See *German Interest In Polish Upper Silesia,* P.C.I.J., Ser. A, No. 6, p. 22 (1925); ALI, *Restatement (Second), Foreign Relations Law of the United States, supra,* § 193(1). Moreover, in modern commercial transactions, the parties to a contract may specify a body of trans-na-

Cf. *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 134–135, n. 2. The fact that commercial acts were performed by a foreign state rather than by a private person does not operate to confer a protected status upon such acts under those standards. See *Victory Transport, Inc.* v. *Comisaria General, supra.* See generally, Mann, *State Contracts and State Responsibility,* 54 Am. J. Int'l L. 572 (1960). In this respect, therefore, commercial claims against foreign states or their enterprises are justiciable. Cf. *First National City Bank* v. *Banco Nacional de Cuba, supra,* 406 U.S. at 785–790 (dissenting opinion of Mr. Justice Brennan).[17]

In short, the commercial liabilities of a foreign state, like those of any private person, may be fixed and determined by a court by reference to a known body of law applicable to commercial enterprises. A foreign state's mere repudiation of such liabilities implicates no other body of law; such a repudiation represents nothing more than adherence to the course of action that gave rise to the commercial liability in the first place. The difficulty of selecting manageable legal standards against which to measure such a repudia-

tional law (*e.g.*, the law of the European Community) as governing their contract.

[17] Moreover, petitioner's claim for restitution in this case is based upon the principle of unjust enrichment, which also is recognized by customary international law. See, *e.g.*, *North Sea Continental Shelf Cases,* [1969] I.C.J. Rep. 3, 136 (opinion of Ammoun, J.). See generally O'Connell, *The Law of State Succession* 103 (1956); Meron, *Repudiation of Ultra Vires State Contracts and the International Responsibility of States,* 6 Int'l & Comp. L. Q. 273 (1957); Friedmann, *The Uses of "General Principles" in the Development of International Law,* 57 Am. J. Int'l L. 279, 295 (1963).

tion therefore does not arise, for such standards inhere in the commercial law governing the underlying commercial transaction. The adjudication of the existence of liability adjudicates the invalidity, or legal ineffectiveness, of the repudiation as well. See *Republic of Peru v. Dreyfus Bros. & Co.,* [1888] L.R. 38 Ch. 348; *Republic of Peru* v. *Peruvian Guano Co.,* [1887] L.R. 36 Ch. 489.

ii. A court's entry of judgment against a foreign state on the basis of a commercial obligation would not embarrass the United States in the conduct of its foreign relations, even if the foreign state has repudiated that obligation. Such a judgment would rest, at bottom, upon a determination that the commercial activities of a foreign state are subject to the same law that applies to commercial acts of private parties: the adjudication of liability would be based upon the law applicable to commercial transactions, and the judicial refusal to give effect to a foreign state's repudiation of that liability would be based upon the principle that a foreign state's commercial activities are in fact governable, and governed, by that law. That is precisely the principle to which the United States has adhered in the conduct of its foreign relations by subscribing to the modern restrictive theory of sovereign immunity.

The United States has, since 1952, adhered to the rule of international law that foreign states are not immune from suits brought against them in their commercial capacities for enforcement of their commercial liabilities. Implicit in this position is the Executive's determination that the adjudication of a

foreign state's commercial acts and liabilities on the merits, and the subjection of the foreign state to judgment on the basis of that adjudication, does not embarrass or interfere with the conduct of our international relations.[18] Moreover, we have been explicitly advised by the Department of State that the foreign policy interests of the United States do not require application of the act of state doctrine in this case. See Appendix, *infra*.

In this case, respondents' repudiation of a commercial obligation is nothing more than a claim to be free of the responsibilities imposed by commercial law, a claim that the United States has rejected as a matter of official policy. No embarrassment arises from a court's enforcement of that policy. No embarrassment arises from a court's refusal to give legal effect to a foreign state's repudiation of the rule of law in commercial affairs.

iii. None of the other concerns giving rise to the act of state doctrine are present here either. In *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at 432–434, this Court expressed the view that the application of customary international law to state acts of expropriation might lead to commercial disruption and piecemeal dispositions of claims against foreign states. But here, commercial disruption would arise only from judicial acceptance of the state act; judicial deference to a foreign state's repudiation of its com-

[18] Accordingly, application of the act of state doctrine here could in no way infringe upon "the basic relationships between branches of government in a system of separation of powers." *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at 423.

mercial obligations would effectively remove the state's commercial transactions from the rule of law, with all the consequent potential for disruption that such a removal would entail. Similarly, such deference, by subjecting private litigants to the whim of the foreign state on a case-by-case basis, would make inevitable a patchwork approach in the resolution of commercial claims against foreign states. See *id.* at 432.[19]

b. Finally, there are strong affirmative reasons, which are implicit or explicit in what has already been said, for refusing to afford the protection of the act of state doctrine to a foreign state's mere repudiation of its commercial liabilities. We merely summarize those reasons here.

Under the modern restrictive theory of sovereign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate the foreign state's commercial acts to the protected status of "acts of state" would frustrate this modern development by permitting sovereign immunity to re-enter through the back door, under the guise of the act of state doctrine. But since the commercial acts themselves should not be entitled to the protection of the act of state doctrine, *a fortiori* the repudiation of the liabilities arising from those acts should be unprotected. It would, moreover, be especially incongruous to permit

[19] Moreover, there would appear to be no significant likelihood that the entry of judgment in commercial litigation would adversely affect the diplomatic claims process. Cf. 376 U.S. at 431–433.

a foreign state that institutes suit here, as respondents have done, in order to enforce rights derived from its commercial activities, to preclude full adjudication of the controversy by claiming the protection of the act of state doctrine for its bald repudiation of counterliability.

The United States has a positive interest in the full adjudication of the rights and duties arising out of the commercial acts of foreign states. With the growing participation of foreign governments and their instrumentalities in international commercial trade, there has been a significant increase in the commercial interaction between American businesses and state-owned foreign enterprises. See, *e.g., International Economic Report of the President, supra,* at 56. It is in the interest of the United States that such commercial interaction be subject to the rule of law. The United States also has a more specific interest in being able to enforce its own laws against foreign-state enterprises engaged in commercial activities having substantial contacts with the United States. Cf. ALI, *Restatement (Second), Foreign Relations Law of the United States, supra,* § 18 at 52 (Comment i); *Steele* v. *Bulova Watch Co.,* 344 U.S. 280; *United States* v. *Sisal Sales Corp., supra; United States* v. *Aluminum Co. of America, supra.* Application of the act of state doctrine to the purely commercial, nongovernmental acts of a foreign state, or to the foreign state's repudiation of obligations arising from such acts under applicable commercial or regulatory law, would effectively remove foreign states' commercial dealings from the realm of law. This Court should not sanction that result.

This is not to say that we believe that the act of state doctrine is to be selectively applied on a case-by-case basis. To the contrary, we believe that adherence to fixed decisional principles here, as elsewhere in the law, is desirable in order to minimize uncertainty and the disputes to which such uncertainty frequently gives rise. Our position, therefore, is not simply that nonapplication of the act of state doctrine here is appropriate because "an exercise of jurisdiction [in this particular case] would [not] interfere with delicate foreign relations conducted by the political branches" (*First National City Bank* v. *Banco Nacional de Cuba, supra,* 406 U.S. at 775 (concurring opinion of Mr. Justice Powell)), but rather that state commercial acts, and state repudiations of obligations arising out of such acts, as entire categories of state activities, are outside the protection of the act of state doctrine. Accordingly, we find it unnecessary to discuss the broader question whether, contrary to this Court's decision in *Banco Nacional de Cuba* v. *Sabbatino, supra,* American courts should adjudicate the validity of other foreign state acts, *i.e.,* acts unrelated to commercial transactions, under customary international law.[20]

[20] We are advised by the Department of State, however, that such adjudications would not embarrass its conduct of foreign relations. See Appendix, *infra.*

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it denies petitioner full recovery on its counterclaim.

Respectfully submitted.

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DECEMBER 1975.

APPENDIX

THE LEGAL ADVISER,
DEPARTMENT OF STATE,
Washington, November 26, 1975.

DEAR MR. SOLICITOR GENERAL:

In the case of *Alfred Dunhill of London, Inc.* v. *The Republic of Cuba,* which is before the Supreme Court on petition for a writ of certiorari, No. 73-1288, the Court has requested the parties to discuss whether its holding in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, should be reconsidered.

The Department of State believes that the question of whether the *Sabbatino* case should be reconsidered involves matters of importance to the foreign policy interests of the United States and requests that its views be conveyed to the Supreme Court.

The views expressed herein are in addition to the arguments presented in the brief amicus curiae which the United States is filing in the *Dunhill* case. As urged in that brief, we do not believe that the *Dunhill* case raises an act of state question because the case involves an act which is commercial, and not public, in nature. Moreover, since 1952, the Department of State has adhered to the position that the commercial and private activities of foreign states do not give rise to sovereign immunity. Implicit in this position is a determination that adjudications of commercial liability against foreign states do not impede the conduct of foreign relations, and that such adjudications are consistent with international law on sovereign immunity.

In the event, however, that the Court reaches the question whether the *Sabbatino* holding should be reconsidered, we believe that the following considerations should be called to the Court's attention:

Since *Sabbatino* was decided in 1964, the Department of State has on two occasions expressed to courts in the United States its views concerning act of state adjudications. First, in the *Sabbatino* case itself, on remand, the Executive Branch declined to make a determination under the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2), "that application of the act of state doctrine is required in this case by the foreign policy interests of the United States." *Banco Nacional de Cuba* v. *Farr*, 272 F. Supp. 836, 837 (S.D.N.Y.), aff'd, 383 F. 2d 166 (C.A. 2), certiorari denied, 390 U.S. 956. Having taken note of the Executive Branch's position, the district court in *Farr* applied the Hickenlooper Amendment and held that a Cuban decree of confiscation violated customary international law. 272 F. Supp. at 838.

Second, in *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, the Department of State informed the Supreme Court that general foreign relations considerations did not require application of the act of state doctrine to bar adjudication of a counterclaim when the foreign state's claim arises from a relationship between the parties existing when the act of state occurred, and when the amount of relief to be granted is limited to the amount of the foreign state's claim.[1] Relying on the precedent of

[1] Since *First National City Bank* was decided, the Department of State has taken the position in the sovereign immunity area that even where a counterclaim exceeds the foreign state's claim, the courts may adjudicate the counterclaim if it arises from the same "transaction or occurrence that is the subject matter of the claim of the foreign state." S. 566, 93d Cong., 1st Sess., § 1607(1); see,

Bernstein v. *N. V. Nederlandsche Amerikaanshe, Etc.,* 210 F. 2d 375 (C.A. 2), where the Department had advised that the act of state doctrine need not apply to a class of cases involving Nazi confiscations, the Department in *First National City Bank* concluded that the act of state doctrine need not be applied "in this or like cases."

Significantly, the *Farr, Bernstein* and *First National City Bank* cases each involved an Executive Branch determination which opened the way for U.S. courts to review an act of state on the merits under international law. In each of these cases, the claim or counterclaim in question alleged that an act of state violated customary international law. Thus, at least on a case-by-case basis, the trend in Executive Branch pronouncements has been that foreign relations considerations do not require application of the act of state doctrine to bar adjudications under international law.

This trend is mirrored in other countries. Apart from the cases cited by Mr. Justice White in *Sabbatino,* 376 U.S. at 440 n. 1, there have been several recent decisions where foreign courts have reviewed state acts under international law.[2] English law, from which our act of state doctrine derives, does not re-

ALI, Restatement, Foreign Relations Law of the United States, Second, § 70(2)(b). In our view, the adjudication of counterclaims against a foreign state, arising from the same transaction, occurrence or subject matter as the claim of the foreign state, does not pose foreign relations difficulties.

[2] See e.g., *In The Matter of Minera El Teniente, S.A.*, 12 Int'l Legal Materials 251 (Superior Ct. Hamburg, 1973) (a foreign state's act of expropriation that violates international law will not be recognized by German courts if the subject matter of the litigation has a substantial contract with Germany); *Braden Copper Company* v. *Le Groupement d'Importation des Metaux*, 12 Int'l Legal Materials 187 (Ct. of Extended Jurisdiction Paris, 1972)

quire British courts to abstain from reviewing state acts under international law.[3] As far as can be determined, this exercise of the judicial function in foreign jurisdictions has not caused serious foreign relations consequences for the countries concerned.

The present case is similar to *Bernstein, Farr* and *First National City Bank*. This Department is of the opinion that there would be no embarrassment to the conduct of foreign policy if the Court should decide in this case to adjudicate the legality of any act of state found to have taken place and to make such

(rejecting sovereign immunity of a state trading company that marketed expropriated copper); *Compagnie Francaise de Credit et de Banque* v. *Consorts Atard*, Clunet, J. de Droit Int'l, 98 (1971), p. 86 (France: Cour d'Appel Amiens, 1970) (foreign expropriation decrees will not be recognized in France absent the payment of prompt, adequate and effective compensation); *Credit Foncier d'Algerie et de Tunisie* v. *Narbonne*, Clunet, J. du Droit Int'l 96 (1969), p. 912 (France: Court de Cassation, 1969) (acts of expropriation not recognized in France unless equitable compensation is first determined); *Obester Gerichtshof* (Austrian Supreme Court), decision of 22 December 1965, Osterr. Juristenzeitung 21 (1966), p. 204, Clunet, J. du Droit Int'l, 94 (1967), p. 941 (an expropriation without compensation violates international law, but no recovery against purchasers of expropriated property); *N.V. Assurantie Maatschappij de Nederlanden van 1845* v. *P. T. Escomptobank*, 33 Int'l L. Rep. 30 (D. Ct. The Hague, 1962) (rejecting act of state defense where there is a violation of international law).

[3] *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria*, [1935] 1 K.B. 140, 50 T.L.R. 284; *Re Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, 346; 1 Lauterpacht, *Oppenheim's International Law*, 267–68 (8th ed. 1955). See also, *Republic of Peru* v. *Peruvian Guano Co.*, [1887] 36 Ch. D. 489 and *Republic of Peru* v. *Dreyfus Brothers & Co.* [1888] 38 Ch. D. 348, where British courts, under international law, refused to give effect to Peruvian laws annulling acts of the preceding Peruvian government; cf. *Buttes Gas and Oil Co.* v. *Hammer* [1975] 2 W.L.R. 425 at 434–35.

adjudication in accordance with any principle of international law found to be relevant.

In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in *Sabbatino* so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States.

Sincerely,

MONROE LEIGH.

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